Benesight, Inc., f/k/a The TPA, Inc., and/or The Third Party Administrators, Inc., *and* Anna Marie Chavez, Laura Hayes, and Beatriz Mercado. Case 27–CA–16932–1

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 9, 2001, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and the General Counsel and the Charging Party filed answering briefs. The General Counsel also filed cross exceptions with a supporting brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[1]

1. The judge found that the Respondent violated Section 8(a)(1) by discharging employees Laura Hayes and Beatriz Mercado, by constructively discharging employee Anna Maria Chavez, and by disciplining eight other employees[2] for engaging in a protected work stoppage on April 10, 2000.

For the reasons set forth in his decision, we agree with the judge that the brief work stoppage here was protected by Section 7 of the Act. It is well settled that "[t]he Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice." *Bethany Medical Center*, 328 NLRB 1094 (1999), citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). It is equally well established, however, that concerted activities that are unlawful, violent, in breach of contract, or otherwise indefensible are not protected. Id., citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

As the Board has held, when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are "entitled to persist in their in-plant protest for a reasonable period of time." *Cambro Manufacturing Co.*, 312 NLRB 634, 636 (1993).[3] Each of these conditions—which distinguish a protected in-plant work stoppage from an unprotected sit-down strike—was satisfied in this case. Further, there can be no valid contention that the discharged employees were engaged in trespass (the misconduct of sit-down strikers). They never refused an order to leave the premises, and they returned to work when they were asked to do so. Thus, Respondent was never deprived of the use of its premises.

Instead, the Respondent bases its defense principally on the decision of the United States Court of Appeals for the Seventh Circuit in *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012 (1998). According to Respondent, that decision imposes a "proportionality obligation on employees engaging in the kind of unannounced work stoppage pursued in this case." Respondent argues that employees lose the protection of the Act if they use a disproportionate means to protest a working condition. On this view, because the Respondent contends that the work stoppage here was an over-reaction to the employees' grievance, it argues that it was free to discharge them.[4] We reject this argument as inconsistent with the Act and its policies.

The Respondent challenges the reasonableness of the employees' decision to withhold their services. However, the Supreme Court has held that the "reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *NLRB v. Washington Aluminum Co.*, supra, 370 U.S. at 16. As the Board recently held in *Trompler, Inc.*, 335 NLRB 478, 480 (2001),

> [I]f employees are protesting working conditions, . . . those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees' choice of means of protest.

Further, the Seventh Circuit's "reasonableness" analysis in *Bob Evans Farms*[5] has been applied only in circumstances where the employee work stoppage is to protest a *supervisor's* conduct, selection, or discharge.

[1] We have modified the judge's recommended Order in accordance with our decisions in *Excel Container*, 325 NLRB 17 (1997), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We have also modified his recommended Order to provide narrow cease-and-desist language. *Sands Hotel & Casino*, 306 NLRB 172 fn. 4 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993). See fn. 7, infra. Finally, we have substituted a new notice.

[2] These disciplined employees were Jeffrey Todd, Joan Ortiz, Patty Kruse, Joan Johnson, Johnnie Hansen, Jarrod Efird, Cheryl Blount, and Kim Pearson.

[3] Courts have approved the Board's analysis. See, e.g., *Roseville Dodge v. NLRB*, 882 F.2d 1355 (8th Cir. 1989); *NLRB v. Pepsi Cola Bottling Co.*, 449 F.2d 824 (5th Cir. 1971), cert. denied 407 U.S. 910 (1972); and *Golay & Co. v. NLRB*, 371 F.2d 259 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967).

[4] The employees were protesting the addition of a requirement that they fill out a certain form on each customer call that they received.

[5] This analysis is premised on the Fifth Circuit's decision in *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963).

Thus, the issue in those cases—where it was alleged that the supervisor's conduct, selection, or discharge in turn impacted employees' conditions of work—was whether the walkout was a reasonable means of protesting an employer's action. That analysis is inapplicable here where the April 10 work stoppage was in response to a direct change to the *employees'* terms and conditions of employment, and did not involve employee protest concerning a supervisor.

Finally, even where we find the principles of *Bob Evans Farms* applicable, that case is factually distinguishable. *Bob Evans Farms* involved an employee strike over the dismissal of a restaurant supervisor which, since it was undertaken at the peak dinner hour, "had the immediate effect of crippling the restaurant's ability to function." 163 F.3d at 1024. Further, there was no evidence in *Bob Evans Farms* that the striking employees were willing to resume their posts. Id. This case presents a very different picture. The employees' grievance involved a matter that directly changed their working conditions, the effect of their brief work stoppage was comparatively modest, and the employees did return to work promptly. And, even assuming that employees have a "proportionality obligation" when engaging in lawful concerted activity, that obligation was satisfied here: the limited work stoppage clearly bore a reasonable relation to the underlying grievance.

For the foregoing reasons, we find that the employees' April 10 work stoppage was protected and that the discipline, discharge, and constructive discharge of the participants violated Section 8(a)(1).[6]

2. The judge dismissed the allegation that the Respondent violated Section 8(a)(1) when Manager Vicki Potestio told employee Mercado that, when Potestio's boss was notified of the work dispute and stoppage, "the first thing [the boss] said was to fire everybody" involved. The judge found that Potestio's statement was not unlawful because it reflected management's reaction to a past event [the work stoppage], and did not threaten future action. The General Counsel excepts, and we find merit to that exception. Thus, as argued by the General Counsel, we find that Potestio's statement, uttered after the work stoppage, would reasonably tend to discourage future protected concerted activity. It sends the message to employees that, if they engaged in those activities, they could be discharged. The Board has held that an employer's threat to discharge employees if they engage in a strike or other protected work stoppage violates Section 8(a)(1) of the Act.[7] Thus, we find that the Respondent violated Section 8(a)(1) based on Potestio's statement to Mercado.

3. The General Counsel also excepts to the judge's failure to find that the Respondent independently violated Section 8(a)(1) by telling discharged employees that they had been terminated for engaging in protected, concerted activity.

The judge found that Manager Potestio told Mercado on April 11 that, based on Mercado's participation in the previous day's work stoppage, she had been insubordinate and was terminated. Although the judge determined that Potestio's statement was proof that the discharge was unlawful, he concluded that this statement was subsumed by the discharge violation. We disagree. Rather, as argued by the General Counsel, we find that Potestio's statement linking her discharge to the protected walkout was coercive and independently violated Section 8(a)(1). *Sands Hotel & Casino*, 306 NLRB 172, 184 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993). Thus, the statement was one that would reasonably tend to coerce employees in the exercise of their Section 7 rights.

[6] The Respondent did not file an exception to the judge's characterization of Chavez' termination as a constructive discharge. However, in the Respondent's subsequent reply to the General Counsel's and the Charging Party's opposition to the Respondent's exceptions, and in response to the General Counsel's and the Charging Party's cross-exceptions, the Respondent asserts to the Board for the first time that Chavez voluntarily resigned from her employment, and that the General Counsel and the Charging Party have failed to meet their burden of showing that Chavez was constructively discharged under the standards articulated in *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986).

Regardless of whether the Respondent's belated challenge to the constructive discharge characterization of Chavez' termination could be considered as an untimely exception, we find, in any event, that Chavez was effectively discharged. Specifically, Mercado and Hayes, Chavez' two fellow instigators of the protected work stoppage, had just been unlawfully discharged. Chavez' supervisor, Aaron Tomlinson, told Chavez "You're next." Chavez told Tomlinson "I won't let you fire me." Tomlinson then said and did nothing to dispel Chavez of her clearly expressed belief that she was about to be fired. Consequently, Chavez gathered up her personal belongings, asked a fellow employee to take her employee badge and parking permit, and left the premises.

The fact of discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), enfd. 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer "would logically lead a prudent person to believe his [her] tenure has been terminated." *NLRB v. Trumball Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964). Under this analysis, the determination of whether there was a discharge is judged from the perspective of the employees, and is based on whether the employer's statements or conduct "would reasonably lead the employees to believe that they had been discharged." *NLRB v. Hilton Mobile Homes*, 387 F.2d 7, 9 (8th Cir. 1967).

Applying these principles here, we find that Tomlinson's silence and inaction, in the face of Chavez' clearly expressed and entirely reasonable belief that she was about to be fired on the heels of her cohorts Mercado and Hayes, conveyed the fact of her termination to her just as clearly and effectively as the Respondent had *expressly* conveyed the immediately preceding discharges to Mercado and Hayes.

[7] See, e.g., *Robertson Industries*, 216 NLRB 361 (1975), enfd. 560 F.2d 396 (9th Cir. 1976).

Contrary to our dissenting colleague, we find no basis for disregarding this otherwise unlawful 8(a)(1) statement simply because the Respondent followed through on its coercive claim and terminated Mercado. We reject our colleague's argument that Potestio's statement was merely part of the res gestae of the unlawful discharge. The statement and discipline are separate and distinct violations. To disregard this violation would effectively privilege unlawful statements—which are independently coercive—when the respondent contemporaneously gives effect to its unlawful words.

Accordingly, we reverse the judge and find that Potestio's statement to Mercado violated Section 8(a)(1).

4. Finally, we find no merit in the General Counsel's contention that the judge, by failing to find that the Respondent violated Section 8(a)(1) when Potestio interrogated and threatened employees for engaging in protected concerted activities. It is clear, however, that the judge did find that Potestio interrogated and threatened employee Chavez in violation of Section 8(a)(1). Specifically, the judge found that Potestio's question to Chavez as to who "the instigators of the strike were," followed up by Potestio's statement that, "she felt that it was insubordination on my part and I should have known better! That it would affect my employment," constituted an unlawful interrogation coupled with a coercive threat.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and fully set forth below,[8] and orders that the Respondent, Benesight, Inc., f/k/a The TPA, Inc., and/or The Third Party Administrators, Inc., Wayzata, Minnesota, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging, giving written warnings to, or otherwise discriminating against employees because they engage in concerted activity protected by the National Labor Relations Act.

(b) Threatening employees with discharge while interrogating them concerning their participation in protected, concerted activity.

(c) Threatening employees with discharge if they engage in protected, concerted activity.

(d) Coercing employees by informing them that employees had been discharged for having engaged in concerted activity protected by the Act.

(e) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Beatriz Mercado, Laura Hayes, and Anna Marie Chavez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Beatriz Mercado, Laura Hayes, and Anna Marie Chavez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and to the unlawful written disciplines to Beatriz Mercado, Laura Hayes, Anna Marie Chavez, Jeffery Todd, Joan Ortiz, Patty Kruse, Joan Johnson, Johnnie Hansen, Jarrod Efird, Cheryl Blount, and Kim Pearson, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges or disciplines will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

[8] The judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We note that the General Counsel did not request broad injunctive relief and we do not find the Respondent's conduct in this case egregious enough to warrant the issuance of such an order. Accordingly, we are issuing a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Sands Hotel & Casino*, supra; *Hickmott Foods*, 242 NLRB 1357 (1979).

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) by terminating employee Beatriz Mercado, for engaging in a protected work stoppage. I also agree that this violation was established, in part, by a statement by Manager Vicki Potestio to Mercado. In that statement, Potestio informed Mercado that, based on her participation in the work stoppage, she had been insubordinate and was terminated. Contrary to the majority, however, I agree with the judge that Potestio's statement did not independently violate Section 8(a)(1), or call for an additional remedy. Rather, I find that Potestio's statement was part of the res gestae of the unlawful termination, and is subsumed by that violation. Further, the remedy for that violation adequately insures employees of their statutory rights. Respondent discharged Mercado for her protected activity. The order requires Respondent, inter alia, to cease and desist from such conduct, and to notify employees that it will cease and desist therefrom. Accordingly, there is no need to find an additional violation based on Respondent's telling an employee that it had engaged in that violation. This finding of an additional violation and the imposition of an additional remedy constitute the kind of unnecessary "piling on" that a busy federal agency should seek to avoid.

In all other respects I agree with my colleagues.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, give written warnings to, or otherwise discriminate against you because you engage in concerted activity protected by Section 7 of the Act.

WE WILL NOT threaten you with discharge while interrogating you concerning your participation in concerted activity protected by Section 7 of the Act.

WE WILL NOT threaten you with discharge if you engage in protected, concerted activity.

WE WILL NOT coerce you by telling you that other employees have been discharged for having engaged in concerted activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Beatriz Mercado, Laura Hayes, and Anna Marie Chavez immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice of their seniority or any other rights or privileges previously enjoyed.

WE WILL make Beatriz Mercado, Laura Hayes, and Anna Marie Chavez whole for any loss of wages or other benefits they may have suffered as a result of our discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the above unlawful discharges of Beatriz Mercado, Laura Hayes, and Anna Marie Chavez and to the written disciplines given to Jeffery Todd, Joan Ortiz, Patty Kruse, Joan Johnson, Johnnie Hansen, Jarrod Efird, Cheryl Blount, and Kim Pearson and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

BENESIGHT, INC., F/K/A THE TPA, INC. AND/OR THE THIRD PARTY ADMINISTRATORS, INC.

Leticia Pena, Esq., for the General Counsel.

Kevin P. Staunton, Esq., of Minneapolis, Minnesota, for the Respondent.

Richard Rosenblatt and *Stanley M. Gosch, Esq.,* of Greenwood Village, Colorado, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Pueblo, Colorado, on November 28, 2000,[1] on the General Counsel's complaint which alleged that the Respondent discharged the three Charging Parties for having engaged in a protected, concerted work stoppage in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, et seq. Other violations of Section 8(a)(1) are also alleged.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the employees' work stoppage on April 10, was not protected.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent is a corporation engaged in the design and administration of self-funded healthcare benefits for employers and their employees, with its principal office in Wayzata, Minnesota, and a facility in Pueblo, Colorado. The Respondent annually performs services from its Pueblo facility directly for firms located outside the State of Colorado valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

So far as is material here, the Respondent employs at its Pueblo facility a customer service staff of about 76 under Manager Vicki Potestio. The basic position is customer service representative (CSR) whose duties involve taking telephone questions concerning specific claims as well as general eligibility and benefit information for the various healthcare plans administered by the Respondent. The CSRs are organized into geographical area teams and are trained on the various healthcare policies administered by the Respondent in a specific area. The CSRs involved in this dispute are members of the Minnesota team and service the 147 policies the Respondent administers in Minnesota. For each call, the CSR makes a computer entry and is required to handle 65 to 71 calls a day.

On Friday, April 7, the CSRs were notified of a temporary change in procedure such that they would be required to fill out an "action ticket" on each call requiring some action and subsequently transfer the action ticket documentation to their computer. They were advised they would be paid overtime if such was necessary to complete the transfer process.

Since Friday was a typically slow day, the CSRs apparently had no difficulty with this change in process. However, Monday, April 10, was very busy and many of the CSRs in the Minnesota team concluded that requiring a written action ticket was time consuming causing them to fall behind in making computer entries. Apparently there was also some confusion as to when and how the CSRs would imput the action ticket data to their computers. Thus during their morning break, Anna Marie Chavez, Laura Hayes, and Beatriz Mercado discussed this matter and determined not to take any more calls until they could get a resolution of their problem from management, notwithstanding that the new system was announced to be temporary. They also persuaded other members of the Minnesota team to log off the phone system and join them.

When Supervisor Aaron Tomlinson asked them to log back on to the system they refused. They were then approached by Potestio, who asked the employees to designate a group of four to participate in a phone conference with a management official in Minnesota later that day concerning the new procedure. The employees agreed and the work stoppage ended after about 15 to 20 minutes. According to the Respondent's record, during this period 56 calls went unanswered. This record also shows that between 4 and 5 p.m. (the ending time on the report), 61 calls went unanswered.

Following what the Respondent refers to as an investigation, it was concluded that Mercado, Hayes, and Chavez were the instigators of the "phone line shut down, giving unauthorized directives to their peers to participate in the shutdown, and not following directives from the supervisors and managers to get back on the phones." (R. Br. 11.) Thus on April 11 Mercado and Hayes were discharged. Upon being told by Tomlinson that "You're next," Chavez told him "I won't let you fire me." She took her personal effects from her desk, asked another employee to take her badge and parking pass, and she left. The eight other employees involved were given written warnings styled "final" counseling.

The discharges of Mercado and Hayes and the constructive discharge of Chavez are alleged violative of Section 8(a)(1) of the Act. Certain statements made by Potestio and Tomlinson during the course of the investigation and on effecting the discharges are also alleged violative of Section 8(a)(1).

The CSRs are not represented by a labor organization, nor do they have any kind of a grievance procedure, though the Respondent argues that such exists because under the "Communication" section in "The TPA Employee Handbook" employees are advised that their supervisor "is your best and fastest source of information and generally should be your starting point to help you with your suggestions or problems." Also available to employees are human resources representatives and a suggestion box. There is, however, no formal grievance procedure.

B. Analysis and Concluding Findings

1. The work stoppage

As a general proposition, a concerted work stoppage by employees, even if they do not leave the work area, is protected activity under Section 7 of the Act. But, as the Board noted in *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993), "Not every work stoppage is protected activity, however; at some point, an employer is entitled to assert its private property rights and demand its premises back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake." (Citations omitted.)

[1] All dates are in 2000, unless otherwise indicated.

Here the work stoppage was undeniably concerted and lasted about 15 to 20 minutes. The employees had no recourse to a grievance procedure. They were not told to resume work or leave the Respondent's premises. Thus, under these circumstances, the issue is whether the employees' activity lost its protection.

In all the cases analyzed by the Board in *Cambro* (including those cited by the Respondent) where the work stoppage was found to have lost its protection under the Act there was a demand by the employer that the employees leave the premises. Usually the work stoppage was much longer than the 15 to 20 minutes here. And there was in place some kind of a grievance procedure. As noted, none of those factors was present here. Specifically, an illegal trespass found by the Board and courts was not present here. As soon as Potestio approached the employees and asked them to select four employees to participate in a conference call to resolve their grievance, the employees returned to work. However, the proffered opportunity to speak with higher management did not materialize.

Finally, the damage to the Respondent's work product was minimal. Although 56 calls went unanswered, this does not mean that they were not eventually serviced. While quick and accurate service of incoming calls is an important aspect of the Respondent's product, at least weekly calls are deferred as, for instance, when the Respondent has a meeting for all employees on a given team. Further, later on April 10, 61 calls went unanswered during a 1-hour period. The damage to the Respondent's operation must be considered minimal. I therefore reject counsel for the Respondent's argument that the damage done was "a disproportionate means of protest" of the working condition the employees sought to correct by their concerted action.

I conclude that the work stoppage concertedly engaged in by employees on April 10 did not lose the protection of Section 7 and that to have disciplined and discharged employees who participated in it was violative of Section 8(a)(1) of the Act.

The Respondent admitted discharging Mercado and Hayes and giving written warnings to other employees because they engaged in the work stoppage; however, the Respondent denied the allegation that Chevez was constructively discharged. The only testimony concerning Chevez is her credible assertion that she quit when Tomlinson told her she would be next, after Mercado and Hayes had been terminated. I conclude that her quitting, shortly in advance of being fired along with the others, was a constructive discharge for having engaged in protected, concerted activity.

2. Interrogation and Threats

It is alleged that certain statements of Tomlinson and Potestio during and following the work stoppage independently violated Section 8(a)(1). Specifically, it is alleged that when Tomlinson sought to learn why the employees had logged off their phones on April 10, such was unlawful interrogation. I conclude not.

Chevez testified that after the employees had decided to log off their phones, Tomlinson approached them, noted that he too "would have been pretty frustrated" with the change in policy. He asked "what are your gripes." The employees told him that they did not what to go back to their phones until the problem was resolved. He asked if they were "really going to do this." They told him they were, and he left to get Potestio. There is nothing in this testimony which would suggest a threat or other unlawful coercion. I conclude that Tomlinson's attempt to find out what the employees were about was well within the bounds permissible under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Accordingly, I shall recommend that paragraph 4 of the complaint be dismissed.

Chevez further testified that when Tomlinson returned with Potestio, Potestio "asked us what we considered we were doing, what were we doing. She was just very angry that we had as a group decided to log off the phone rather than take it to her like she said we could." Chevez and others responded that they felt overwhelmed, did not believe logging off was insubordination, and felt they were not being supported by the management team. Potestio then asked them to log back on and she would let a group of four sit in on a conference call to the home office. I find no threat in this.

However, later, when Potestio was investigating this matter she called in Chevez, asked who "the instigators of the strike were" and stated: "she felt that it was insubordination on my part and that I should have known better. That it would effect my employment. That it could effectively stop my employment." Such is interrogation with a coercive threat and therefore violated Section 8(a)(1) of the Act.

Mercado testified that later on April 10, she was called in and questioned by Potestio and Fran Alexander, identified as an individual with human resources, concerning the work stoppage. Potestio asked what had led to what she referred to as the strike. Mercado denied that it was a strike, but told Potestio of their problems with the new system. Mercado testified that Potestio "told me that she has spoken to Cindy Gibbs (Potestio's boss stationed in Minnesota) and Cindy told her—the first thing that Cindy said was to fire everybody. She wanted everybody fired."

Citing *Robertson Industries*, 216 NLRB 361 (1975); and *Safety Kleen Oil Services*, 308 NLRB 208 (1992), counsel for the General Counsel argues that Potestio's statement that Gibbs told her to fire all the employees who had engaged in the work stoppage was an unlawful threat. No doubt this statement is evidence that the discharges were unlawful. However, I conclude that it was not independently an unlawful threat. A threat implies an if/then relation between two future events. In the cited cases, the employer told employees that should they continue to engage in protected activity, they would be discharged. Here, the protected activity had ceased nor was there any indication that such would resume. Gibbs' statement was her reaction to a past event. I conclude that this statement did not threaten employees with discharge should they engage in some future activity. I therefore conclude that paragraph 5(a) and (b) be dismissed.

Similarly, the General Counsel alleges that the Respondent independently violated Section 8(a)(1) by telling the discharged employees that they had been discharged for having engaged in protected, concerted activity. No doubt Potestio's statement to Mercado is proof that the discharges were unlawful; however, I

conclude that the statement, so far as it might be considered a violation of the Act, is subsumed in the finding that the discharges were unlawful. Accordingly, I will recommend that paragraph 5(c) be dismissed.

On April 12 Potestio called a meeting of the entire customer service department and, according to the credible testimony of Brenda Crespin, Potestio said "she's sorry for you know kind of what happened in front of all of us new people but they got what they deserved."

This is alleged in paragraph 5(d) to have been violative of the Act. I agree. Though somewhat ambiguous, I conclude that the remaining employees were left with little doubt that discharged employees had been discharged for engaging in protected activity. The statement was therefore coercive. See *Baker Electric*, 317 NLRB 335 (1995), enfd. 105 F.2d 647 (4th Cir. 1997).

III. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including offering Beatriz Mercado, Laura Hayes, and Anna Marie Chavez reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions of employment, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and removing from its files any reference to the discharges and the written warnings given to Jeffery Todd, Joan Ortiz, Patty Kruse, Joan Johnson, Johnnie Hansen, Jarrod Efird, Cheryl Blount, and Kim Pearson.

On the foregoing findings and conclusions, I hereby enter the following recommended

[Recommended Order omitted from publication.]